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2
3 UNITED STATES DISTRICT COURT
4 EASTERN DISTRICT OF WASHINGTON

5 UNITED STATES OF AMERICA,)
6 Plaintiff,) NO. CR-11-0042-JLQ
7 vs.) SENTENCING MEMORANDUM
8 KEVIN HARPHAM,)
9 Defendant.)
10

11 The sentencing hearing in this matter was held on December 20, 2011. Defendant
12 Kevin Harpham was present, in custody, and represented by Federal Defenders Roger
13 Peven, Kim Deater, and Kailey Moran. The Government was represented by Michael
14 Ormsby, the United States Attorney for this district, and by Tom Rice and Joseph
15 Harrington, Assistant United States Attorneys. This Memorandum will memorialize and
16 supplement the oral rulings of the court.

17 **I. Introduction**

18 Defendant Kevin Harpham was before the court for sentencing pursuant to pleas
19 of guilty to Counts I and III of the Superseding Indictment made in open court on
20 September 7, 2011. Those Counts stemmed from the Defendant admittedly having placed
21 an explosive device containing shrapnel coated with rat poison, an anti-coagulant
22 substance, along the Martin Luther King, Jr. Day unity parade route in Spokane,
23 Washington on January 17, 2011. The pleas were made pursuant to a Rule 11(c)(1)(C)
24 plea agreement (the "Agreement") in which the Government and Defendant agreed to a
25 sentencing range of 27 to 32 years imprisonment. The Agreement further provided that
26 the Government would argue at sentencing for a term of 32 years, and the Defendant
27 would argue for 27 years. (ECF No. 200, p. 12). The Agreement further provided that

1 the Defendant would be entitled to withdraw his pleas of guilty if the sentence exceeded
2 32 years. The Government was entitled to withdraw from the Plea Agreement if the
3 sentence was less than 27 years. The court accepted the Agreement in a written Order
4 filed November 9, 2011. (ECF No. 216).

5 **II. Guidelines Calculation**

6 While the parties had agreed to a sentencing range of from 27 to 32 years, the court
7 first determined the applicable Guideline (USSG) range. The parties stated in the Plea
8 Agreement that the base offense level was 28. The parties agreement as to offense level
9 is not binding on the court, but the Pre-Sentence Investigation Report (“PSIR”) also
10 found the base offense level to be 28, for the violation in Count I of 18 U.S.C. §
11 2332a(2), Use Of A Weapon Of Mass Destruction, prior to applying the cross-reference
12 according to USSG § 2M6.1(c)(2) and USSG § 2A2.1(a)(1) resulting in a base offense
13 level of 33. The parties also agreed that a 3-level increase would apply “because the
14 intended victims were selected based on the actual or perceived race, color, religion[,]
15 national origin, or ethnicity of any person.” (ECF No. 200, p. 11). The PSIR also
16 recommended this 3-level increase. The PSIR thus resulted in an adjusted offense level
17 of 36. The PSIR then recommended a 3-level reduction for acceptance of responsibility
18 for a total offense level of 33. With a criminal history category I, the resulting Guidelines
19 range was 135 to 168 months. No objection to this base calculation was filed by either
20 party. However, the PSIR set forth factors that could warrant upward departures under
21 USSG § 2A2.1 and USSG § 3A1.4. Counsel were also advised orally and in writing
22 (ECF No. 231) that the court was considering these departures and invited supplemental
23 briefing thereon, which the parties submitted.

24 Defendant filed a response to the draft PSIR in which he stated: “Mr. Harpham has
25 no objection nor additions to the computation of the Offense Level found in the PSIR.”
26 (ECF No. 217, p. 3). Defendant also filed a Sentencing Memorandum (ECF No. 221)
27 discussing the § 3553(a) factors and arguing for a sentence of 27 years. Defendant also

1 filed a supplemental memo (ECF No. 233) arguing that the upward departures should not
2 apply. The Government suggested consideration by the court of the upward departure
3 factors.

4 **A. Upward Departures**

5 USSG § 2A2.1, comment 2, provides: “If the offense created a substantial risk of
6 death or serious bodily injury to more than one person, an upward departure may be
7 warranted.” Defendant admitted in the Plea Agreement that his offense conduct posed
8 a risk of bodily injury. Defendant’s argument now is that the risk was not “substantial.”
9 The court rejects that argument and finds that there was a real and substantial risk of
10 death or serious bodily injury to more than one person. Approximately 2,000 people had
11 gathered for the parade. The IED contained over 100 fishing weights coated in rat
12 poison, an anti-coagulant, and was thus capable of inflicting serious bodily injury to
13 more than one person. The court determined that an upward departure of 5 levels was
14 warranted because of the substantial risk of serious bodily injury to more than one person.
15 It was, and is, the conclusion of the court that had the explosive device not been found,
16 and the parade route then changed, the Defendant, who was present among the thousand
17 of participants, would have ignited the explosive device with the result being serious
18 bodily injury, and probably death, to many men, women, and children.

19 USSG § 3A1.4 provides for a 12-level increase and an adjustment to criminal
20 history category VI where the felony “involved, or was intended to promote, a federal
21 crime of terrorism.” Even if the 12-level increase is not applicable by reason of the
22 terrorist target being civilians, instead of government, Commentary Note 4 provides that
23 an upward departure may be warranted where “the terrorist motive was to intimidate or
24 coerce a civilian population.” The Ninth Circuit has previously approved of a 12-level
25 upward departure (without increase in criminal history category) where the terrorist
26 activities were directed at private conduct. In *United States v. Tankersley*, 537 F.3d 1100,
27 1113 (9th Cir. 2008), the Circuit stated: “We therefore hold that the district court’s

1 decision to depart - based on its desire to punish terrorist activities directed at private
2 conduct in a manner similar to how it punished terrorist activities directed at government
3 conduct - did not render Tankersley's sentence per se unreasonable." This court found
4 that the Defendant's conduct was intended to intimidate the civilian population who
5 chose to participate in the unity parade on Martin Luther King, Jr. Day. The court further
6 found that a 3-level upward departure was appropriate under Note 4 to USSG § 3A1.4.

7 The court thus reached a calculation of a final offense level 41 (33 + 5 levels under
8 2A2.1 + 3 levels under 3A1.4). With a criminal history category I, the resulting
9 Guideline range was determined to be 324 to 405 months.

10 **III. The 18 U.S.C. § 3553(a) Factors**

11 Section 3553(a) provides that a court shall impose a sentence "sufficient but not
12 greater than necessary" to reflect the seriousness of the offense, promote respect for the
13 law, afford adequate deterrence, protect the public, and provide correctional treatment in
14 the most effective manner. The court considered the factors set forth in Section 3553(a)
15 including the nature and circumstances of the offense and the history and characteristics
16 of the Defendant. The Defendant's statements to the court at sentencing that he only
17 intended to aim the destructive device at an adjoining building were not credible and were
18 completely contrary to the undisputed facts including the coating of the fishing weights
19 shrapnel with rat poison to inhibit coagulation of the blood of injured persons and also
20 contrary to his racist views set forth in his internet messages and blogs. The clear
21 evidence in this case was that the Defendant intended to cause injury and death to
22 participants in the parade and would have done so had the explosive device not been
23 found and the parade route altered.

24 **IV. Acceptance of Responsibility**

25 The final Guideline calculation determined by the court, prior to the Defendant's
26 sentencing statements, of offense level 41, included a 3-level deduction for acceptance
27 of responsibility. During Defendant's allocution it became clear that he had not accepted

1 responsibility for his offenses as required for a reduction under USSG § 3E1.1.
2 Defendant was not entitled to this adjustment merely by virtue of having pled guilty. See
3 Comment 3, § 3E1.1 (“A defendant who enters a guilty plea is not entitled to an
4 adjustment under this section as a matter of right.”).

5 Based on Defendant’s incredible statements at sentencing it became clear that he
6 was not entitled to a deduction for full or partial acceptance of responsibility. Without
7 the 3-level adjustment for acceptance of responsibility, the Offense Level would have
8 been 44 and the guideline range life imprisonment. However, with or without the 3 level
9 reduction for acceptance of responsibility, the appropriate sentence in this matter, having
10 in mind the § 3553(a) factors, was and is determined to be incarceration for a period of
11 32 years followed by a term of life Supervised Release.

12 **V. Conclusion**

13 In a case such as this, involving the attempted use of a weapon of mass destruction,
14 motivated by racial animus, the court finds a sentence of 32 years is sufficient, yet not
15 greater than necessary, to reflect the serious and cruel nature of the offense, to promote
16 respect for the law, to provide deterrence to this Defendant and, hopefully, to other
17 misguided individuals, and to protect the public from further crimes by the Defendant.

18 **IT IS SO ORDERED.**

19 The Clerk shall enter this Memorandum and furnish copies to counsel. The formal
20 Judgment and Commitment Order will follow.

21 Dated this 27th day of December, 2011.

22 s/ Justin L. Quackenbush
23 JUSTIN L. QUACKENBUSH
24 SENIOR UNITED STATES DISTRICT JUDGE
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